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SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.,

Petitioners,

v.

HERBERT BARNESS, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Olan B. Lowrey on behalf of the Board of Supervisors of Buckingham Township prays that a writ of certiorari issue to review the judgment of the Commonwealth Court of the Commonwealth of Pennsylvania in the captioned matter. Such judgment is dated January 25, 1978. The Supreme Court of the State of Pennsylvania refused to grant allocatur (certiorari) by order dated July 3, 1978 and entered of record on August 16, 1978.

Opinions Below

The opinion of the Common Pleas Court at the trial level in the State of Pennsylvania is reported at 29 Bucks Co. L.Rep. 280 (1976) and is included herein as Appendix 1. The opinion of the Commonwealth Court, intermediate appellate court and the Highest Court in the State of Pennsylvania that heard this matter, is reported at 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978) and is included herein as Appendix 2. The Supreme Court of Pennsylvania declined to hear the above case. Such order denying appeal was entered on August 16, 1978. It is included as Appendix 3. The docket entry sheet showing date of entry as "Counsel Advised of Order" is included as Appendix 4.

The Pennsylvania Supreme Court recognizes that the time within which petitioners must make a petition for rehearing to that Court begins to run on the date of entry of the order. Clearly, were this not so the seven day period within which to make motion for rehearing would quite frequently have expired prior to the time counsel was notified by mail, the letters being placed in the mail on

the day of entry. (See Appendix 4.) Though substantial periods of time frequently expire between the date of an order by the Pennsylvania Supreme Court and the date that it is entered of record, the rather lengthy period in this instance stemmed from the absence of a Mrs. Bierman who handles the allocatur docket. She was on vacation.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USCA Section 1257(3), 62 Stat. 929 which authorizes this Court to review final judgment of decrees rendered by the highest court of a State by writ of certiorari where the validity of a state statute is drawn into question on the ground of it being repugnant to the United States Constitution.

Questions Presented

This action began, pursuant to Pennsylvania procedural law, before the Board of Supervisors of Buckingham Township in rural Bucks County, Pennsylvania. Eight constitutional challenges were filed after respondent landowners were apprised of the intent of the Township to rezone their land. The

argument was that the Township Zoning Ordinance constituted an unlawful interference with private property rights, that it was unconstitutional because it did not permit the property owners and developers to build or erect townshouses, multi-unit housing and mobile homes. The constitutional challenges were consolidated.

After extensive hearings the Board of Supervisors rejected the constitutional challenges and completed rezoning respondents' land for agricultural use as planned at the time the constitutional challenges were filed.

Their land was rezoned from a density of one house per acre to two houses per acre in an agricultural zone. The Supervisors held that the applicants had gained no vested right to develop free of the new zoning scheme known to them when they filed. Appeal was taken to the trial court level. The trial court ruled that the respondents had gained a vested right to develop their property at 6.3 to 10 units per acre in an area zoned for one unit per acre at the time of their chal-

lenge and rezoned for two units per acre at the time of the trial court hearing. Affirmance followed on the basis of the 5th and 14th Amendments to the Federal Constitution. The questions are:

1. Do resident property owners have standing to assert the rights of unnamed third persons to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance on the ground that it is exclusionary?

2. Do property owners have standing to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance where rezoning would grant no relief to them?

3. Is a rural township zoning ordinance unconstitutional under the 5th and 14th Amendments because a property owner is not allowed to build or erect townhouses, apartments or mobile homes?

4. Have respondents by making a constitutional challenge in response to a proposed zoning change gained under the 5th and 14th Amendments a vested right to develop without regard to Township zoning?

Constitutional Provisions Involved

Amendment V

"No person shall...be deprived of life, liberty, or property, without due process of law....

Amendment XIV

"Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

...

Statement

As stated in Surrick v. Zoning Board of the Township of Upper Providence, et al., 476 Pa. 182, 382 A.2d 105, 107, 108 (1977) (Appendix 5), the exclusionary zoning doctrine in the State of Pennsylvania is based on the Pennsylvania Constitution as "circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution."

In June of 1972 petitioner Buckingham Township initiated the preparation of a comprehensive plan as a prelude to revising the Township Zoning Ordinance that dated in essential part back to 1952. The primary motivation for the Township's action was to protect

its agricultural industry which at that time, as now, was the primary industry in that rural part of Bucks County, Pennsylvania.

Inherent in the planning was the necessity to plan pursuant to the latest environmental standards and to at the same time meet certain judicially created criteria for zoning in the State of Pennsylvania. With respect to a far more highly populated township than rural Buckingham the Pennsylvania Supreme Court had shortly before held that there must be some provision for high density housing in order to avoid the zoning ordinance being set aside as unconstitutional in favor of a vested right to develop free of the zoning power. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

The planning was envisioned as a prototype to stop urban sprawl and preserve farmland. The planning process was funded in part by the Department of Community Affairs in the State of Pennsylvania. Extensive input and assistance was given by planners from the University of Pennsylvania and elsewhere. The massive and seminal effort was to form the basis for and

act as a catalyst to such environmental planning throughout the State of Pennsylvania and the nation.

The planning proceeded with customary dispatch until such time as a comprehensive plan had been prepared and made known to the public through a series of public meetings and newspaper reports. The comprehensive plan contained colored maps explicitly designating the land of each of the respondents to be zoned for agriculture with limited development. State law required that the planning be public. Opening Meeting Law, Pa. Stat. Ann. tit. 65, §§ 261-269 (Purdon Supp. 1978); Pennsylvania Municipalities Planning Code, Pa. Stat. Ann. tit. 53, §§ 10101-11202 (Purdon).

The plan provided that a significant portion of the Township was to be rezoned as agricultural. Development was to take place primarily in a development district. The Township planned for high density housing and other development that would meet the needs of twice the number of people predicted by the Bucks County Planning Commission as likely to move into the Township over the next twenty years.

At such time as the intent of the Township to rezone was clear to several individuals owning property there eight challenges were made to the constitutionality of the existing zoning ordinance. The challenges alleged deprivation of private property rights and claimed a vested right to develop without regard to the then proposed zoning ordinance. The specific grounds alleged for unconstitutionality ranged from lack of express provision for mobile homes and townhouses to lack of express provision for multi-unit housing in the old 1952 Zoning Ordinance. It was known to respondents that the Township in its rezoning scheme was to provide for all of these things. The uncontested findings of fact show that seven had actual knowledge and that the eighth had constructive if not actual knowledge.

Under Pennsylvania procedural law the constitutional challenge was submitted first to the Board of Supervisors of Buckingham Township. After some thirty-eight hearings stretching over a protracted period the Board of Supervisors determined

to reject the constitutional challenges whereby the individuals sought to rezone their property for their personal economic benefit in a manner inconsistent with both the existing and proposed zoning ordinance. Instead, the Township passed the ordinance that it had been working on for some time before and during the protracted hearings on the constitutional challenges. In effect the Board held that respondents must comply with the new zoning ordinance of which they had knowledge when they filed their constitutional challenges.

Respondents appealed to the trial court level in Pennsylvania. The trial court reversed the Board of Supervisors, holding that the Township Ordinance was unconstitutional and therefore respondents had gained a vested right to develop eight thousand units of housing in derogation of both the new and old township ordinances. All of the lower courts refused to consider the new zoning ordinance.

The development proposed by respondents was on prime agricultural land known to them to be

scheduled to be zoned as agricultural land. The eight thousand units of housing proposed would house some six times the population projected to move into the Township during the ensuing twenty years. Respondents' proposals ranged as high as ten units of housing per acre.

An appeal was taken by the Township to the appropriate Pennsylvania intermediate court of appellate jurisdiction, the Commonwealth Court. That Court (Appendix 2) sustained the holding of the trial court that the individual respondents who filed the constitutional challenges had gained a vested right to develop their land as proposed by them. The intermediate appellate court affirmed the trial court in holding that the vested right gained by the individuals transcended the exercise of the police power by the Township to enact a new zoning ordinance applicable to respondents' land though they had filed their constitutional challenges with full knowledge of the intended rezoning of their land for primarily agricultural purposes.

The Township, the State Department of Environmental Resources, an environmental group called the Land Use Task Force and the Pennsylvania Society of Planners then petitioned for allocatur (certiorari) to the State Supreme Court. The State Supreme Court declined to grant allocatur.

Reasons for Granting the Writ

1. Resident property owners do not have standing to assert the rights of unnamed third persons to challenge under the 5th and 14th Amendments the constitutionality of a zoning ordinance on the ground that it is exclusionary. The writ should be granted because the decisions of the courts below are in direct conflict on this principle with that of this Court in Warth v. Seldin, 95 S.Ct. 2197, 422 U.S. 490 (1975). Respondent developers have been erroneously granted standing to assert the rights and legal interests of third parties not even named in the litigation as party's plaintiff. Every respondent is a property owner and resident of Buckingham Township. No respondent pleaded the names of any person or persons who were alleged to

be excluded.

In Warth certain individuals not resident in the town of Penfield and low-income housing organizations alleged that the town zoning was unconstitutional and in violation of 42 USCA 1981, 1982 and 1983. The evidence alleged was that some 98% of the town was zoned for single family detatched dwellings and only .03% was zoned for multi-unit housing. The relief requested was to declare the zoning ordinance of the town of Penfield unconstitutional and to order the defendants to enact a new ordinance designed to correct effects of their past actions.

This Court sustained a denial of standing to the low-income housing organizations on the ground that they could not represent the interests of third parties, stating at p. 2205:

> "...second even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this court has held that the plaintiff generally must assert his own legal rights and interest and cannot rest his claim to relief on the legal rights or interests of third parties."

On the same grounds this Court sustained a finding of no standing even as to certain individuals who had alleged a desire to live in the town, stating at p. 2207:

> "But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves had been excluded, or that the respondents' asserted illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'"

In Rasmussen v. City of Lake Forest, Illinois, 404 F.Supp. 148 (N.D. Ill. 1975), it was held that an individual making allegations under both the 14th Amendment equal protection clause as well as the substantive taking provision of the 5th Amendment had no standing to argue equal protection on behalf of third parties. Unfortunately, the second

half of his argument to the effect that he was being deprived of his property without due process of law was not addressed by the court because not properly briefed.

Further, in Surrick v. Zoning Board of the Township of Upper Providence, et al., 476 Pa. 182, 382 A.2d 105 (1977), it is made clear that the equal protection clause of the 14th Amendment has no relevance to the Pennsylvania exclusionary zoning decisions being decided pursuant to a substantive due process analysis under the 5th and 14th Amendments. 476 Pa. at 193, 382 A.2d at 110:

> "Different requirements pertain when it is alleged that a zoning ordinance perpetuates class-based or racially discriminatory housing patterns in violation of the Equal Protection Clause. In such a case, proof of this allegation would require evidence of racial or class-based motive. See Arlington Hts. v. Metro. Housing Dev. Co., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977). However, the instant case does not raise an equal protection challenge. Finally, it should be noted that the decisions of this Court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of certain uses, not on the exclusion of certain classes of people."

It is clear that respondents, exclusively residents of the Township, are in no position to assert the alleged injury that has been suffered by other unidentified members of a class to which in this instance they do not belong but which they do impliedly purport to represent. The courts below had no grounds to consider a 5th and 14th Amendment challenge on the basis of unnamed third parties being excluded from the Township.

It is noted that the necessity to meet Federal standing principles in Federal constitutional litigation initiated in state court, as here, was implicitly affirmed in Regents of University of California v. Bakke, 98 S.Ct. 2733 (1978). This Court stated:

> "Several amici suggest that Bakke lacks standing, arguing that he never showed that his injury-- exclusion from the medical school--will be redressed by a favorable decision... Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected." (fn. 14 at p. 2743)

The quote serves to introduce the next section.

2. Property owners do not have standing to challenge the constitutionality of a zoning ordinance where there is no probability that rezoning would be a benefit to them.

In Warth this Court sustained denial of standing to individual petitioners who alleged that they desired to live in the town of Penfield on the ground that there was no showing that even if the zoning ordinance were in fact revised to correct the alleged deficiencies that they themselves would benefit from the action, stating at p. 2208:

> "...Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantive probability that they would have been able to purchase or lease in Penfield and that, if the Court affords the relief requested, the asserted inability of petitioners will be removed."

and at p. 2209:

> "...Instead, they rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the Court to afford relief.
>
> [20, 21] We hold only that a plaintiff who seeks to challenge exclusionary zoning

> practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the courts' intervention."

The same principles must apply here. Even if the Township were forced to rezone, there was no reason for these individuals filing constitutional challenges to believe that their land would be included in a category that would ultimately* prove any more profitable to them than the manner in which it was currently zoned.

To the contrary, as known to respondents, a comprehensive plan had already been prepared for the Township that showed their land was to be rezoned primarily for agricultural use under circumstances where most of the land would have to remain undeveloped. Thus, there was no "substantial probability" that their land would be rezoned to their

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* Population expansion will ultimately create a demand for the density levels proposed. At that time being able to develop at 6.3 to 10 units per acre rather than .5 units per acre will add millions of dollars of value to the land.

satisfaction even if rezoned. In fact the zoning ordinance that was passed after hearings on the constitutional challenges provided for a density level of not more than one house for each two acres with not more than ten percent of the land to be utilized for housing.

In a closely related consideration it was stated in Warth:

...

> "...[T]his court has recognized other limits on the class of person who may invoke the court's decision on remedial powers. First, the court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." 422 U.S. at 499.

Respondents are simply property owners among thousands in Buckingham Township and their capacity to make more money by rezoning their property is shared in substantially equal measure by most property owners in the Township. This is because with farms and large lot development in a rural area almost every property owner could subdivide to his ultimate profit

if permitted to do so. This being the case, respondents had no standing to urge the 5th or 14th Amendment to challenge the constitutionality of the Township statute as it applied to all citizens. Rather, under this law and the facts of this case they are relegated to asserting only such rights under the 5th and 14th Amendments as they might have in relation to their own property. Those rights would be to prove the allegation made, as by Mr. Schlanger, that the Township Zoning Ordinance "... deprives Applicant of legitimate reasonable uses of his land without justification." As aptly stated in D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 94 (1977) respecting the right of a landowner to make a Federal due process challenge:

> "[F]or the landowner to make such a challenge, and unless he can prove something akin to outright confiscation, he must lean upon the rights of future residents."

Respondents cannot prove the first nor, under Warth, do the second.

3. A zoning ordinance in a rural township is not unconstitutional under the 5th and 14th Amend-

ments to the Federal Constitution because a property owner is not allowed to build or erect townhouses, apartments or mobile homes when there is no demand in the Township for higher density housing. The court below should be reversed because of a highly erroneous application of the 5th and 14th Amendments to the Federal Constitution to declare a zoning ordinance unconstitutional because it did not provide for townhouses, apartments and mobile homes.

The exclusionary zoning doctrine in the State of Pennsylvania has been repeatedly articulated by the State Supreme Court as a Federal constitutional issue. National Land and Investment Company v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) and Surrick v. Zoning Hearing Board of the Township of Upper Providence, 476 Pa. 182, 382 A.2d 105 (1977). The doctrine is essentially that all ordinary housing types and natural population densities must be permitted in every governmental planning unit. With irrelevant exceptions the planning units in Pennsylvania are township units.

Some ordinary uses have been defined as mobile home parks, East Pikeland Township v. Bush Bros., Inc., 13 Pa. Commw. Ct. 578, 319 A.2d 701 (1974); townhouses, Camp Hill Development Company, Inc. v. Zoning Board of Adjustment of Dauphin, 13 Pa. Commw. Ct. 519, 319 A.2d 197 (1974) and apartment buildings, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

The Federal constitutional issue was most thoroughly discussed by the Supreme Court of Pennsylvania in Surrick (Appendix 5). That Court stated that the constituional standard being applied by all Pennsylvania courts on the issue of exclusionary zoning was based on Article I, Section 1 of the Pennsylvania Constitution as "circumscribed" by the 5th and 14th Amendments to the Federal Constitution, at p. 107:

> "Article I Section 1 of the Pennsylvania Constituion protects the citizen's right to the enjoyment of private property, and governmental interference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. V, XIV; Pa. Const. art. 1, § 1*; Girsh

* Quoted at p. 38.

> Appeal, 437 Pa. 237, 241 n. 3, 263 A.2d 395, 397 n. 3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965), citing, inter alia, Glorioso Appeal, 413 Pa. 194, 196 A.2d 668 (1964). Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare."

The focus now will be on the question of constitutionality under the 5th and 14th Amendments of the 1952 Township Ordinance as amended without regard to the possible rights of respondents if the ordinance were in fact unconstitutional.

It is assumed that the lower courts in invoking the 5th and 14th Amendments while rejecting any equal protection application of the 14th did so within the usual context, that is that the 14th serves to make the 5th applicable to the states and their subdivisions. The universal context of the

5th Amendment argument is that a property owner has been deprived by zoning of an opportunity to make any reasonable use of his property. Therefore, it has been taken without just compensation.

In the instant litigation a variation of this assertion was made by respondents but their primary emphasis was that the 1952 ordinance was unconstitutional because it did not provide for townhouses, multi-unit housing or mobile homes. No evidence was presented or argument made that there was no market demand for the one unit per acre zoning applicable to their properties. Respondents did argue and present evidence to the effect that they could make more money if their properties were zoned for a higher density. It is, of course, universally accepted that being able to make more money if zoned differently does not support a charge of taking. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

We are then dealing with the old fashioned and simple question of whether respondent developers could make a reasonable use of their property with

one acre zoning. The other side of the coin is the extent and scope of the police power to zone for the benefit of the majority. The seminal decision that dealt with both sides of that coin is Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There, this Court in a case of first instance determined that breadth of the police power was such that a Township could under the facts zone in such a way as to diminish the value of private property by as much as 75%. In an effort to delineate the scope of the police power the Court stated it in broad terms indeed:

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstance and condition." (p. 387)
>
> ...
>
> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." (p. 388)

After reminding the nation in Nectow v. City of Cambridge, 277 U.S. 183 (1928) that the po-

lice power was not entirely without limits, this Court left well enough alone until 1973 when it strongly reaffirmed that the police power is indeed still broad. Village of Belle Terre, et al. v. Bruce Borras, et al., 416 U.S. 1 (1974).

A far-reaching township ordinance prohibiting cohabitation by more than two persons unrelated by blood, adoption or marriage was sustained in a highly supportive decision written by Justice Douglas. In stressing the importance of government planning for the public benefit Justice Douglas held for the majority:

> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> [4,5] A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." (95 S.Ct. 1541)

It is submitted that it is not seriously debatable that a Township can zone in a manner consistent with the market demand in the area where it is located. That it can do so is certainly "arguable".

In Buckingham Township when this litigation was initiated in 1974 the public records and evidence presented show a Township with some 7500 people, approximately twenty-one thousand acres and some 2200 dwelling units. Though the Township had in 1971 zoned land for densities of two and four units per acre no permits for development at either density level had been issued by March of 1974 when the constitutional challenges were initiated. On the other hand, over 400 permits had been issued during that interval for construction on lots of one acre or greater. No one wanted to develop at a higher density than one acre. Therefore, not only could the land of the developers be put to some reasonable use as zoned, it was zoned for its highest and best residential use at that point in time.

The converse of that fact is that the zoning clearly bore a substantial relationship to health,

safety and welfare.

None of the cases that are generally regarded as relevant to the issue of exclusionary zoning give any support to respondents' position in the instant litigation. In the highly publicized case of Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975), appeal dismissed and cert. den. 423 U.S. 803 (1975) and its progeny from the State of New Jersey the courts have carefully relegated the basis of their decisions to New Jersey law relating to the rights of non-residents.

Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291, appeal dismissed, 409 U.S. 1003 (1972) out of New York sustained the exercise of the police power through a controlled growth statute against an allegation that controlling the rate of growth was a violation of the 14th Amendment to the Federal Constitution. Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. den., 424 U.S. 934 (1976) was virtually the same case as Ramapo. Neither hints that zoning a property in a

manner consistent with its most economically fruitful use for residential purposes constitutes a taking. No cases decided outside Pennsylvania do.

It is respectfully submitted that nothing in the 5th or 14th Amendments as generally construed, or as they could be construed, lends even colorable support to the proposition of respondents that a zoning ordinance constitutes a taking without just compensation where land is zoned for residential use consistent with its greatest dollar value.

4. Respondents have not by making a constitutional challenge with knowledge of a proposed zoning change gained under the 5th and 14th Amendments to the Federal Constitution a vested right to develop without regard to either existing or proposed zoning in the Township.

If it is assumed arguendo that Buckingham Township's 1952 Zoning Ordinance is unconstitutional under the 5th and 14th Amendments, does that invalidity give to respondents a vested right to develop without regard to the zoning power?

Conceptually the same principle of deprivation of property without just compensation in violation of the 5th and 14th Amendments that controls the issue of constitutionality of the 1952 statute must control this issue as well. The difference lies between asking whether a person's property has been taken because it cannot be put to any reasonable use and whether a personal good faith expenditure made in reliance on an existing governmental standard is such that a vested right arises that permits development in defiance of existing and proposed zoning.

No case has been found from any jurisdiction, other than Pennsylvania and New Jersey (where only New Jersey law was relied upon) suggesting that even a successful challenge to the constitutionality of an ordinance gives a right to develop pursuant to any standard other than that in effect at the time a permit was requested. In Pennsylvania the courts have taken the unique position that the 5th and 14th Amendments automatically permit the developer to de-

termine his own density and style of housing, apparently because the existing statute has been declared to be unlawful in its entirety.

This is believed to be erroneous under any standard. First, in the instant case it is believed conclusive under Warth, as discussed, that respondents had no standing to challenge the statute in its entirety because they could not represent the interests of unnamed third parties, did not stand to benefit even if successful in securing a rezoning and were not affected differently from other citizens by the existing zoning.

Second, even if they had such standing they filed with full knowledge of the Township plans to rezone their land as agricultural.

In most cases a substantial expenditure has been required as well as good faith filing in reliance on existing planning, as in the cases that follow. Governments would function poorly with any other standard. It is one thing to permit a property owner to proceed pursuant to public planning already incorporated into the law for the public

benefit. It is totally another, as here, to permit development without regard to any standard other than private profit.

The general principle has been stated accurately in 8 E. MC QUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 25, 133 (3rd ed. 1976):

> "However, it has been held that the doctrine of vested rights permits a landowner to complete a project in the face of a new law purporting to prohibit the development of the project where the landowner in reliance upon governmental action has in good faith suffered substantial detriment thereby acquiring a vested right to proceed to develop property."

As early as 1904 this Court in Dobbins v. Los Angeles, 195 U.S. 223 (1904) had adopted the same standard. The principle was applied in favor of an individual who had purchased land zoned so as to permit the erection of gas works. He obtained a permit for the erection of a gas works and began construction. A later municipal ordinance rezoned the land in question so that a gas works was not permitted. The action, it was held, constituted a taking under the due process clause of the 14th Amendment and was not, therefore, a proper exercise

of the police power. (p. 241)

So far as petitioners can determine the principle has been universally applied in all circuits, an example being the case of District of Columbia v. Cahill, 54 F.2d 453 (D.C. Cir. 1931). The Court stated the principle to be that:

> "... a party acting in good faith under affirmative acts of a municipal corporation, and making expensive and permanent improvements in reliance thereon, would unjustly and inequitably be deprived of the rights which the corporation had granted to him." (p. 455)

In the instant litigation, each developer had knowledge of a proposal by the Township to rezone his land for primarily agricultural use. The knowledge was personal as to every developer with one possible exception. The possible exception, Ciccone, had at least constructive knowledge because of a published comprehensive plan proposing to rezone his land as agricultural. The comprehensive plan was clear and unequivocal on this point. A color-coded map was appended showing that the land of each of the developers was to be zoned as agricultural.

Further, the record shows no expenditures in reliance on the existing planning. No surveys were made, nor streets laid out, no soil testing done or curbs or utilities put in in reliance on one acre zoning. No planning of any nature or degree was done pursuant to the one acre zoning that was in effect when each applicant filed a constitutional challenge. Rather, the developers proposed density levels ranging from 6.3 to 10 units per acre. The courts below granted them the right to develop at those densities. In effect, the developers have received court sanction to do their own zoning, thereby zoning solely and exclusively for their economic benefit without regard to the existing or proposed comprehensive plan or zoning ordinance.

A township must zone in relation to the public welfare. Respondents have been told that they may zone solely in relation to their own.

In this case, as a result of seven* constitutional challenges closely following one after the

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* One challenge was withdrawn.

other, some eight thousand housing units outside the zoning power are proposed for a rural township currently having only some two thousand five hundred units of housing. The picture is even more inexplicable when it is realized that there was no demand for higher density housing at the time it was proposed.

Conclusion

It is stressed that the decision in the instant case is not the mechanism by which a fair share of people are to live in Buckingham Township. At the time of the constitutional challenge the Township was already moving towards accepting over twice the number of people desiring to move into the Township. The proposals of the developer respondents would in aggregate exceed six times the expected population over the next twenty years.

It is further stressed that the lower court decisions are not designed to enable a reasonable use of property. They are by fair analysis decisions to enable developers to make enormously more

money than they otherwise could, and at the expense of their fellow citizens. All other property owners are bound by planning done for the benefit of the majority. If there were no zoning these respondents would not have gained anything. Their gain is based on the restrictions on development by other citizens. Only respondents are exempt from the zoning power.

By the lower courts' extraordinary decisions these respondents are to be allowed, at such time in the future as a market develops based on population expansion, to develop at a density of twenty times that of their neighbors. For the public good their neighbors are restricted and yet must bear the truly excessive density burden to be created by respondents' development free of the zoning power.

That one acre zoning in a rural township without a current market demand for greater density is legal is clearly "arguable" under Euclid. And, even if it were not, the Constitution gives no vested right to developers to zone for themselves independ-

ent of the police power. That too is at least "arguable."

Because of the importance of planning in a modern society, especially the preservation of agricultural land, because of the total negation of rational planning doctrine and because of totally erroneous application of the 5th and 14th Amendments, the lower courts should be reversed.

Respectfully submitted,

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A certificate of service is being filed by separate document.

OLAN B. LOWREY
Attorney for Petitioners

The provision of the Pennsylvania Constitution Article I, Section 1, "constrained" by the 5th and 14th Amendments reads:

> "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."

App. 6

Supreme Court, U. S.
FILED
NOV 14 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS,

Petitioners,

v.

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., & DELLA ENDERS, his wife, JOHN F. ENDERS, JR., DELLA E. ENDERS and WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

OLAN B. LOWREY
1719 North Broad Street
Philadelphia, Pa. 19122

Attorney for Petitioners

IN THE COURT OF COMMON PLEAS
OF BUCKS COUNTY
CIVIL ACTION - LAW

CLAUDE J. SCHLANGER	:	
vs.	:	No. 75-2561-08-5
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	ZONING APPEAL
JOHN F. & DELLA ENDERS, JR.	:	No. 75-2562-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
JOHN F. ENDERS, JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.	:	No. 75-2563-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
HERBERT & IRMA BARNESS	:	No. 75-2993-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	

JOSEPH A. & NORMA J. CICCONE, his wife	:	No. 75-2994-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
ROBERT H. YAROSCHUK and K. PATRICIA YAROSCHUK	:	No. 75-3053-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES	:	No. 75-4715-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	

INTERVENORS

Commonwealth of Pennsylvania, Department of Environmental Resources

Buckingham Township Planning Commission

Manoff et al

Land Use Task Force

Bucks County Planning Commission (amicus)

BEFORE MONROE, P.J., LUDWIG, WALSH, JJ.

OPINION AND ORDER

Owners of seven tracts of land comprising approximately 5% of the total township area have appealed to this court from the refusal of the governing body of Buckingham Township to adopt their curative amendments to its zoning ordinance of 1951. All but one of the challengers seek to construct multi-family dwellings, apartments, townhouses, or other forms of cluster housing. At the time when the challenges[1] were filed, the lands of all applicants were zoned for single-family detached homes on lots of not less than one acre. They have averred that the ordinance was unconstitutionally exclusionary under the rule of Girsh[2] and kindred cases in that none of the stated housing types was permitted anywhere in the Township.

[1]Municipalities Planning Code, Act of June 1, 1972, P.L. _____ No. 93 §1004, 53 P.S. 11004.

[2]Girsh Appeal, 437 Pa. 237 (1970).

The remaining applicant, Fairway-Smith Associates, seeks to establish a mobile home park zoning district. Its challenge rests on the expressed prohibition in the 1951 ordinance against this type of housing arrangement. Bush Bros., Inc. vs. East Pikeland Township, 13 Commonwealth Ct. 578 (1974).

The Township appears to acknowledge that the challenged ordinance was unconstitutionally exclusionary and we so find. The controversy centers on the significance of a new ordinance which was adopted in the year following the institution of the challenges. All parties are in accord that the issues are as follows:

> (1) Whether the new ordinance of March 6, 1975, was pending in the constitutional sense on the dates the curative amendment applications were filed.
>
> (2) If not pending, was the new ordinance an effective cure of the defects in the 1951 ordinance?
>
> (3) Whether the applicants' proposals are reasonable and not injurious to the public health, safety, welfare and morals.

An ordinance is pending in the constitutional sense when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning.[3] The events preceding the adoption of an ordinance must be examined whenever the issue of pendency is raised. The following sequence of events occurred in the instant cases:

> June 27, 1972 and January 30, 1973: As a prelude to revision of the 1951 ordinance, the Township contracted with the county planning commission for a revised Township comprehensive plan.
>
> December 1973 and January 17, 1974: Public meetings by Township planning commission to consider the new comprehensive plan.

[3] Casey v. Zoning Hearing Board, 459 Pa. 219, 328 A.2d 464 (1974). Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971).

Curative amendment applications:

March 7, 1974	Schlanger (incomplete)
March 22, 1974	Barness
March 28, 1974	Ciccone
April 3, 1974	Yaroschuk
April 3, 1974	Schlanger (amended)
April 9, 1974	Enders
April 9, 1974	Enders-Shedden
July 25, 1974	Fairway-Smith

March 26, 1974 and April 10, 1974: Advertisement and adoption of new comprehensive plan. Contract with county planning commission for preparation of a new zoning ordinance.

April 10, 1974 to December 1974: Various public meetings of Township planning commission culminating in submission of the proposed zoning ordinance to the governing body.

June 1974 to March 19, 1975: Hearings on the curative amendment applications.

December 26, 1974, January 2, 1975: Advertisements by governing body of public

meeting for January 9, 1975, to consider new zoning ordinance.

March 6, 1975: Enactment of zoning ordinance. Re-enacted January 1976, to correct procedural defect in enactment.

April 10, 1975 and April 17, 1975: Rejection of curative amendment applications, and readoption of new ordinance as cure.

Both sides to the controversy have advanced divergent views on the question of whether the foregoing events are sufficient to meet the pendency test. The applicants contend that nothing short of an advertisement by the Township of the proposed ordinance prior to the filing of the challenges will suffice. The Township, on the other hand, urges the broader view that this court may find a sufficient public declaration of an intent to rezone the entire Township by considering the full gamut of the activities of the various

public bodies involved in the rezoning process, beginning with the signing of a contract with the county planning commission for a revised comprehensive plan some two years prior to the institution of the challenges. In support of its view, the Township points to the publicity given to the planning activities in the press and the participation by interested citizens in the months before the curative amendment applications were filed.

At least seven recent appellate decisions are available to guide us in resolving the issue. Of course each case turns on its own facts. The ordinance was held to be pending where - prior to the application - the planning (zoning) commission advertised the proposed ordinance and made it available for public inspection, and the ordinance was adopted after the date of the application.[4] The

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[4]Boron Oil Co., supra. Bucks County Housing Dev. Corp. v. Plumstead, ___ Pa. Commonwealth Ct. ___, 361 A.2d 447 (1976).

ordinance was held not to be pending where the governing body resolved - prior to the application date - to consider an amendment at a public hearing and the public hearing was not advertised until after the application was filed;[5] where a challenge was filed and a proposal to amend was referred to the planning commission on the same day, and the amendment was advertised three weeks later;[6] where the township advertised an amendment and tabled it indefinitely prior to the date of the challenge;[7] where the only significant activity prior to the date of the challenge was advertisement by the planning commission of a hearing on revisions of the comprehensive plan providing for new multi-family zoning classifications;[8] where the

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[5]Mutzig vs. Hatboro, 440 Pa. 455 (1970).

[6]Casey v. Z.H.B., supra.

[7]Appeal of FPA Corp. ___ Pa. Commonwealth Ct. ___, 360 A.2d 851 (1976).

[8]Perlstein v. Borough of Monroeville, ___ Pa. Commonwealth Ct. ___, 361 A.2d 510 (1976).

municipality had been considering an amendment to its zoning ordinance for over a year prior to the filing of the challenge, but did not advertise a public hearing on the amendment until after the application was filed.[9]

We see in the foregoing decisions a consistent intent of the appellate courts that an ordinance will be considered pending only where it has been publicly advertised prior to the date of challenge and is ultimately enacted without substantial change. The new Buckingham Township ordinance was not advertised until several months after the challenges were filed. While it is true, as the Township states, that the comprehensive plan is the foundation on which zoning ordinances are constructed, the Commonwealth Court has rejected the concept that the one is tantamount to the other in the context of this issue. The distinction is made that the comprehensive plan is recommendatory, not

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[9]Northampton Township v. G.R.S.H., Inc. 14 Commonwealth Ct. 364 (1974).

mandatory. F.P.A., supra; Perlstein, supra. We are constrained to hold that the ordinance of 1975 was not pending on the dates any of the challenges was instituted. This brings us to the question of whether, as the Township contends, the ordinance of 1975 should be considered as an effective cure of the defects in the earlier ordinance.

In Casey, supra, the Supreme Court stated its recognition that a successful challenger should not be frustrated by a retributory township. In that case the new zoning ordinance which was enacted after the challenge was instituted cured the constitutional infirmity, but failed to include the challenger's land in the provision for multi-family housing, the lack of which had been the basis of the challenge. In Ellick[10] the challenge was denied by the Township's failure to act within the time allowed by the M.P.C., and the Township did not enact any curative amendment of its own.

[10]Ellick v. Worcester Township, 17 Commcnwealth Ct. 404 (1975).

There the Commonwealth Court stated "We do not decide in this case what happens if the governing body adopts a curative amendment different from the one which was proposed by the landowner." The Township in the cases before us reasons that its new ordinance must be recognized as a valid cure if its purpose and effect was not to zone around the applicants. In support of its position, it relies on the decision of our court in Carr vs. New Britain Township, 28 Bucks Co. L.Rep. 108 (1975), which is presently on appeal to the Commonwealth Court. In that case the applicant challenged the validity of an ordinance which prohibited any expansion of non-conforming uses and submitted a curative amendment allowing expansion "to whatever extent appropriate to accommodate the natural growth and expansion of such non-conforming use." The Township responded with an amendatory ordinance allowing 50% expansion. On appeal to this court, a three-judge panel ruled that

> "The only logical interpretation of Article X of the MPC is that if a landowner proposes a curative amendment and the governing body either rejects it or takes no action on it then on appeal the original ordinance must stand on its own feet. But where a challenge is made, a cure demanded, and a cure is received, then on appeal the only true issue before the court is the reasonableness of the ordinance as cured."

In Dublin Properties vs. Upper Dublin Township, 21 Pa. Commonwealth Ct. 54, 342 A.2d 821 (1975), the applicant filed a curative amendment to build townhouses, and the challenge was upheld. The Commonwealth Court added:

> "The Township is apparently considering an amendment which will permit townhouses and thus cure the defect in the ordinance. Zoning amendments pending after the filing of a challenge, however, are not applicable to the challenging landowner's case (citing Casey)."

The Dublin decision does not appear to have come to the attention of counsel and this court at the time Carr was argued and decided. In view of the quoted statement in Dublin a doubt is raised that our court's conclusion in Carr will be held to be correct. We think the import of Dublin is

that we must look not to the ordinance of 1975 but to Section 1011 of the MPC[11] which imposes broad duties on the court to formulate judicial relief.

This section provides in part:

> "(1)...
>
> (2) If the court finds that...a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials...it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body...for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order."

The appellate courts have stated at length guidelines to implement Section 1011.[12] Having successfully challenged the old ordinance, the applicants are entitled to proceed with their proposed developments subject to reasonable

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[11] Act of 1972, June 1, P.L. ___ No. 93, §1011, 53 P.S. §11011.

[12] Casey, supra. Ellick, supra. Kaufman & Broad vs. Supervisors, 20 Commonwealth Ct. 116 (1975).

restrictions to protect the public health, safety, welfare and morals. We will refer all elements of the proposals to the Board of Supervisors in order that this body may restudy them in the existing record and formulate reasonable restrictions which will be subject to review in this court.

We urge the applicants and the Township to enter meaningful negotiations with a view toward resolving their differences. It is hoped that at the very least such negotiations will narrow the areas of conflict.

Some of the applicants have protested the ground rules imposed by the Board whereby combined hearings were held. We agree with the Board that the enormity of its task required this method. More than 2500 pages of testimony were compiled in 20 hearings over a nine-month period. We are satisfied that all applicants were given reasonable opportunities to be heard. In In (sic) the event that it may become necessary to review further action of the governing body, we will consider

each appeal individually.

ORDER

AND NOW, this 27th day of October, 1976, the appellants' zoning challenges are sustained and the records are remanded to the board of supervisors for further proceedings and review not inconsistent with this opinion. Jurisdiction of the appeals is retained during the pendency of such further proceedings.

BY THE COURT,

Arthur B. Walsh, Jr., J.

NOTE: Judge Ludwig did not participate.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellants	:	CONSOLIDATED APPEALS
	:	DOCKET NOS.
	:	1941 C.D. 1976
		1942 C.D. 1976
	:	1943 C.D. 1976
		1944 C.D. 1976
v.	:	1945 C.D. 1976
		1946 C.D. 1976
HERBERT and IRMA BARNESS, his wife; JOSEPH A. and NORMA J. CICCONE, his wife; JOHN F., JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.; DONALD GREENBERG, BENJAMIN SEDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, ALVIN NEINBURG, Individuals t/a FAIRWAY-SMITH ASSOCIATES; CLAUDE J. SCHLANGER; and ROBERT H. YAROSCHUK and PATRICIA YAROSCHUK, his wife Appellees	:	1947 C.D. 1976
		1977 C.D. 1976
	:	1978 C.D. 1976
		1979 C.D. 1976
	:	1980 C.D. 1976
		1981 C.D. 1976
	:	1982 C.D. 1976
		1983 C.D. 1976
	:	2083 C.D. 1976
		2084 C.D. 1976
	:	2085 C.D. 1976
		2086 C.D. 1976
	:	2087 C.D. 1976
		2088 C.D. 1976
	:	2089 C.D. 1976

O R D E R

AND NOW, this 25th day of January, 1978, the Order of the court below dated October 27, 1976 is affirmed.

Theodore O. Rogers, J.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellants	:	CONSOLIDATED APPEALS
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HERBERT AND IRMA BARNESS, his wife; JOSEPH A. and NORMA J. CICCONE, his wife; JOHN F., JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.; DONALD GREENBERG, BENJAMIN SEDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, ALVIN NEINBURG, Individuals t/a FAIRWAY-SMITH ASSOCIATES; CLAUDE J. SCHLANGER; and ROBERT H. YAROSCHUK and PATRICIA YAROSCHUK, his wife Appellees		1947 C.D. 1976
		1977 C.D. 1976
	:	1978 C.D. 1976
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	:	1981 C.D. 1976
		1982 C.D. 1976
	:	1983 C.D. 1976
		2083 C.D. 1976
		2084 C.D. 1976
		2085 C.D. 1976
	:	2086 C.D. 1976
		2087 C.D. 1976
		2088 C.D. 1976
		2089 C.D. 1976

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED: OCTOBER 5, 1977 - PHILADELPHIA

O P I N I O N

OPINION BY JUDGE ROGERS FILED JANUARY 25, 1978

The Court of Common Pleas of Bucks County sustained the zoning appeals of seven owners of seven tracts of land in Buckingham Township from the action of the township supervisors dismissing the landowners' challenges to the validity of the township zoning ordinance and refusing their requests for curative amendments.[1] The landowners challenged the validity of the zoning ordinance on the ground that it forbade any new residential development other than the construction of single-family dwelling houses on lots not smaller, and in some districts considerably larger, than 10,000 square feet. This was indeed what the Buckingham Township zoning ordinance provided in the months of March, April and July 1974 when the landowners filed their challenges and requests for curative amendment; it was what the ordinance had provided

from the time of its enactment in 1951; and it continued to be what the ordinance provided until March 6, 1975, almost a year after the first of these challenges was submitted to the supervisors. The zoning ordinance thus clearly prevented the construction of apartments and townhouses proposed by six of the landowners and of mobile home parks proposed by the seventh. The court below concluded that the ordinance was unconstitutionally exclusionary on the authority of Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970), and East Pikeland Township v. Bush Brothers, Inc., 13 Pa. Commonwealth Ct. 578, 319 A.2d 701 (1974), where ordinances which prohibited the use of land for, respectively apartment houses and mobile home parks, were invalidated. We add to those cases Camp Hill Development Company, Inc. v. Zoning Board of Adjustment of Dauphin, 13 Pa. Commonwealth Ct. 519, 319 A.2d 197 (1974), in which we decided that an ordinance prohibiting townhouses was bad on the same grounds. The court below remanded the record

to the board of supervisors for further proceedings,[2] retaining jurisdiction.

Appeals from the order below have been taken by the Township of Buckingham and two intervenors below, the Land Use Task Force, a local landowners group, and the Commonwealth's Department of Environmental Resources.[3] We have allowed the filing of briefs by amicus curiae Bucks County and its Planning Commission, and by Philadelphia Chapter, American Institute of Planners, both supporting the appellants. The cases have been consolidated here as they were below.

Unfortunately for the appellants, all of the law, some of it developed while these cases were being litigated below, is against them. As noted, the township zoning ordinance excluded apartment, townhouse, and mobile home park use, all judicially declared to be legitimate residential uses in the cases hereinabove cited. This showing

by the landowners overcame the presumption of the zoning ordinance's validity and cast the burden on the township of presenting evidence that its prohibitions bore a substantial relationship to health, safety and the general welfare. The appellants' efforts in this regard were not unusual to this class of case and differed only in immaterial detail from those ineffectively made as early as in Girsh Appeal, supra, and as late as in In Re: Application of Friday, Pa. Commonwealth Ct. , A.2d (Nos. 158 C.D. 1977 and 303 C.D. 1977, filed January 9, 1978). Neither the inconvenience to present inhabitants occasioned by increased use of existing public facilities, nor the expense to the public of creating new facilities, nor the certain change of the character of the community, singly or in combination, have ever been held to constitute threats to health, safety and the general welfare, justifying the outlawing of multi-family uses. Indeed, the essence of Girsh Appeal,

supra, and the cases extending its holding to residential uses other than apartments is that the denial to newcomers of a comfortable place to live by refusing to provide for multi-housing uses, is constitutionally impermissible, despite the inevitable effect on the community of an expanding population. The expectation is that the deleterious effects of development can and should be avoided by prompt and effective use of the broad planning and zoning authority placed in the hands of municipalities.

Buckingham Township and the Department of Environmental Resources, however, inveigh against the lower court's grant of definitive relief to the appellants. They say that persons who have successfully challenged an exclusionary zoning ordinance should not have a right to proceed with the development they proposed when they made their zoning application. A first answer to this contention is that there would appear to be no purpose to the requirement of Section 1004(c) of the

MPC, 53 P.S. §11004(c), that requests for curative amendments be accompanied by plans and materials describing the proposed use, if the only result of the proceedings was to be a judicial declaration concerning the validity or invalidity of the ordinance. A second and conclusive answer is that the Supreme Court has siad in the clearest possible language that landowners successful in this kind of litigation must have relief.

> "Finally, we must determine whether a court has the power to grant an applicant-challenger definitive relief upon rendering a zoning ordinance constitutionally inform. The appellee seeks a building permit for the erection of multi-family dwellings on his tract of land located in Warwick Township. This Court, pursuant to its disposition of the petition for enforcement of our order in Girsh Appeal has implicitly held that courts in this Commonwealth have this power. 'Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief.' To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable." Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 230, 328 A.2d 464 (1974).

We do not see how this language could be clearer or how the rule could be otherwise. It is true that Casey, supra, was not begun by request for curative amendment pursuant to Section 1004. However, Nicholas Heim & Kissinger v. Township of Harris, Pa. Commonwealth Ct. , 375 A.2d 1383 (1977), and In Re: Application of Friday, supra, were Section 1004 cases, in which definitive relief was provided to successful challengers.

All of the appellants contend that the appellees should have lost because all of the appellees knew that a new comprehensive plan for Buckingham Township was in preparation before they filed their challenges and because indeed an advertisement of a notice that the adoption of the new comprehensive plan appeared before all except one of the seven zoning challenges was filed. The appellants say that we should decide that this was sufficient notice of the pendency of curative zoning legislation. This thesis flies in the face of all cases in treating

the point. In In Re: Appeal of FPA Corporation, 25 Pa. Commonwealth Ct. 221, 225, 360 A.2d 851, 854 (1976), we wrote:

> "The Comprehensive Plan was advertised for adoption prior to FPA's filing. It is axiomatic, however, that comprehensive plans do not have the effect of zoning ordinances but only recommend land use which may or may not eventually be provided by a legally enforceable zoning ordinance."

In Perlstein v. Borough of Monroeville, 25 Pa. Commonwealth Ct. 489, 493, 361 A.2d 510, 512 (1976), we said:

> "A comprehensive plan is recommendatory, not mandatory . . . and the advertisement of amendments to the comprehensive plan is insufficient as a public notice of intention to rezone." (Citations omitted).

The zoning ordinance which it is said cured the invalidity of the regulations in existence since 1951 was not advertised until December 26, 1974, more than five months after the last of the seven challenges was filed and was not adopted until March 6, 1975.[4]

In Appeal of Carr, 30 Pa. Commonwealth Ct.

342, 346, 374 A.2d 735, 737 (1977), allocatur denied (Pa. Sept. 16, 1977), we said:

> "They (landowners) further contend that the court should pay no regard to any amendments enacted by the governing body which were not (adopted)[5] or not pending at the time the landowners' challenge was submitted pursuant to Section 1004 of the MPC. We agree with this proposition." (Footnote added).

The challenges and requests for curative amendments in this case preceded by many months the "'first sufficient public declaration' of an intent to amend the existing zoning ordinance."[6] They must therefore prevail and the appellees must, upon their compliance with other appropriate township regulations, be issued permits to do what their plans and other materials filed proposed.

The appellants vigorously represent that we should overrule the case law in this field in the interest of the public of Buckingham Township. They say that the appellees' projects should not be imposed on the township because the supervisors and other responsible officers were engaged in a

necessarily time-consuming task of planning what was required to bring the township regulations into conformity with the law. The argument is belied by the record. Girsh Appeal, supra, was decided, as we have noted, in 1970. Not until June 1972 did the township get around to considering a new comprehensive plan; not until April 1974 was the new comprehensive plan adopted; and finally, not until March 6, 1975 was a township zoning ordinance, which presumably conformed to the mandate of Girsh Appeal, adopted. It is too clear for serious argument to the contrary that there can be no justification for five years spent in curing an unconstitutional zoning ordinance. Indeed, by contrast, our researches in the record reveal an amendment to Buckingham Township's Zoning Ordinance adopted in 1970 reducing minimum lot size requirements in explicit response to the Supreme Court's holding in Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) made earlier in the same year.

The appellants' contention that the

challenges should have been rejected be reason of the landowners' asserted bad faith in "racing" new township zoning regulations, is wholly without merit. Penn Township v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1965), principally relied on, is without application. There the landowner sought to establish a lawful nonconforming commercial use by going into business after the public advertisement of a zoning amendment, that is, after the new regulation was pending. The Supreme Court further found that the record facts demonstrated a continued series of maneuvers by the landowner evidencing bad faith efforts to circumvent the "duly authorized" ordinance. Here, of course, there was no advertisement of a proposed new zoning regulation and the landowners were "racing" to avoid, if anything, the deleterious effects on their properties not of proposed controls, but of the continued lack of any controls by the township's failure to cure its invalid zoning ordinance.

Order Affirmed.

Theodore O. Rogers, J.

FOOTNOTES

1. Made pursuant to Section 1004(1)(b) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §11004(1)(b).

2. We, as do the parties, understand that this order to require the issuance of building permits upon compliance by the landowners with all administrative requirements of the township zoning ordinance and other pertinent township regulations in existence when the zoning challenges were filed with the township.

3. A notice of the intervention of the Buckingham Township Planning Commission as of course was filed in the court below and the Planning Commission seems to have been treated as a party below. We point out that intervention as of course is permitted only to the municipality and the owner or tenant of land directly involved in the litigation. Section 1009 of the MPC, 53 P.S. §11009. The Planning Commission filed no appeal to this Court.

4. This ordinance was declared invalid from its inception by reason of procedural irregularities in its adoption in Large v. Buckingham Township, 27 Bucks 319 (1975). It was then reenacted.

5. In the text of our opinion as reported, the word which appears at this place is "corrected"; the word intended was "adopted".

6. This phrase if from Casey v. Zoning Hearing Board, supra, 459 Pa. at 226, 328 A.2d at 467.

Supreme Court of Pennsylvania

Eastern District

Sally Mrvos
Prothonotary

Catherine E. Lyden
Deputy Prothonotary

456 City Hall

Philadelphia, 19107

(215) 686-3581/84

August 16, 1978

Olan B. Lowrey, Esq.
1719 North Broad Street
Philadelphia, Pa. 19122

Re: Buckingham Township Board of Supervisors, et al. v. Herbert Barness, et al.
Petition of: Land Use Task Force
No. 3441 Allocatur Docket

Dear Mr. Lowrey:

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

"July 3, 1978

Petition denied

Per Curiam"

Very truly yours,

A - 3

/s/ Sally Mrvos

Sally Mrvos
Prothonotary

SM:ejh
cc: Thomas J. Oravetz, Esq.
Richard P. McBride, Esq.
John A. Van Luvanee, Esq.
Israel Packel, Esq.
Albert L. Blackman, Jr., Esq.

A - 3

NO. 3441 ALLOCATUR DOCKET

FOR PETITIONER:

Olan B. Lowrey
1719 North Broad Street
Philadelphia, Pa. 19122

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA

v.

FOR RESPONDENT:

Thomas J. Oravetz
Deputy Attorney General
Commonwealth of Pennsylvania
Dept. of Environmental Resources
Suite 1200 - 1315 Walnut St.
Philadelphia, Pa. 19107

Richard P. McBride
Power, Bowen and Valimont
102 North Main Street
Doylestown, Pa. 18901

John A. Van Luvanee
Eastburn & Gray
Federal Savings Building
Doylestown, Pa. 18901

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., DELLA E. ENDERS, WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER, and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES

PETITION OF: LAND USE TASK FORCE

For Amicus: Bd. Supervisors New Britain Twp.:
Albert L. Blackman, Jr.,

Hartzel and Bush
110 N. Main St.
Bucks County PO Box 7
Doylestown, Pa. 18901

February 24, 1978. Petition for Allowance of Appeal from Order of the Commonwealth Court at Nos. 1941-1946 C.D. 1976, 1977-1982 C.D. 1976, 2083-2088 C.D. 1976, filed.

March 13, 1978. Brief in Opposition on behalf of Herbert Barness, Irma Barness, Joseph A. Ciccone, Norma J. Ciccone, Robert H. Yaroschuk, K. Patricia Yaroschuk and Donald Greenberg, Benjamin Seidman, Herbert Burstein, Dr. Alvin Smith and Alvin Neinberg, individuals, t/a Fairway-Smith, Associates, filed by counsel, Richard P. McBride to Nos. 3438, 3441 and 3437 Allocatur Docket

March 13, 1978. Brief in Opposition on behalf of Claude J. Schlanger, John F. Enders, Jr., and Della E. Enders, his wife; John F. Enders, Jr. and Della E. Enders, his wife, and William J. Shedden,

Jr., filed by counsel John A. VanLuvanee to Nos. 3438, 3441 and 3437 Allocatur Docket.

May 10, 1978. Supplementary Petition for Allowance of Appeal by Amicus Curiae Bd. of Supervisors of New Britain Township, Bucks County, Pa. filed.

May 16. Motion to Quash Supplementary Petition filed.

May 17, 1978. Motion to Quash Supplementary Petition filed by John A. VanLuvanee, filed.

ORDER

July 3, 1978

Denied

Per Curiam

February 28, 1978. Wrote for Brief in Opposition (3).

C.P. Bucks Co.

Nos. 75-2561, 2562, 2563, 2993, 2994, 3053, 4715-08-5

March 14, 1978. Petition forwarded to Court with 3437 and 3438.

May 15, 1978. Supplementary Petition forwarded to Court.

May 16, 1978. Motion to Quash forwarded to Court.

May 17, 1978. Second Motion to Quash forwarded to Court.

August 16, 1978. Counsel advised of Order.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

ROBERT B. SURRICK, Appellant	:	No. 541 January Term, 1974
v.	:	Appeal From the Order of the Commonwealth Court at No. 397 C.D. 1973, Affirming the Order of the Court of Common Please of Delaware County, Pennsylvania at No. 11932 of 1972
ZONING BOARD OF THE TOWNSHIP OF UPPER PROVIDENCE, et al. Appellees	:	

_O_P_I_N_I_O_N_

NIX, J. FILED: December 24, 1977

This is an appeal from an order of the Commonwealth Court, Surrick v. Zoning Hearing Bd. of Twp. of Upper Providence, 11 Pa. Commw. Ct. 607, 314 A.2d 565 (1974), affirming an order of the Court of Common Pleas of Delaware County which upheld the denial of appellant, Robert B. Surrick's, application for variance from the terms of the Zoning Ordinance of Upper Providence Township, Ordinance

No. 34 of 1952, as amended, by the Zoning Hearing Board (Board) of Upper Providence Township. (1) The dispositive issue is whether the township ordinance unconstitutionally excludes multi-family dwellings. The Commonwealth Court, in affirming the lower court's order, held that it did not. For the reasons set forth below, we disagree. (2)

The history and facts of this case are as follows. Appellant sought to build apartments and townshouses on a 16.25 acre tract of land (four acres owned by appellant; 12.25 acres under agreement of sale with zoning contingency). The tract is located in an area designated A-1 Residential under the township ordinance, which permits only single family dwellings on one-acre lots. Appellant initially had applied to the Board of Super-

(1) This Court's jurisdiction is based upon the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, art. II, §204, 17 P.S. §211.204 (Supp. 1977-78).

(2) Since we find the ordinance to be unconstitutionally exclusionary, we need not reach the other issues raised by appellant.

visors of the Township to rezone the 12.25 acre tract to B-Business, the only ordinance classification permitting multi-family housing, to develope the site for apartments. The requested rezoning was denied after hearing held on September 2, 1971. Thereafter, appellant revised his plans to include the four acres of ground owned by him. He sought building permits, which were denied by the Building Inspector. An appeal was then taken to the Board requesting a variance and including a challenge to the constitutionality of the ordinance. The Board held hearings and subsequently denied the requested variance. It was this denial which ultimately resulted in the instant appeal.(3)

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(3) Pursuant to the statute as it then existed, the Board made no ruling on appellant's constitutional claims but did make the necessary findings of fact for the disposition of this issue. See Act of July 31, 1968, P.L. 805, art. IX, §910, 53 P.S. §10910 (1968).

This Section has subsequently been amended to provide:

> The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section 1003 and

Upper Providence Township is a western suburb of Philadelphia, located about 12 miles from the center of the city. Providence Road bisects the township along a roughly north-south axis, and Route 1, a limited access highway, intersects Providence Road cutting across the southern quarter of the township in a generally east-west direction (see Appendix for a map of the township). The 1970 census set the township's population at slightly over 9,200; the total acreage of the township is approximately 3,800 acres. Approximately one-quarter of the township land is undeveloped.

The zoning ordinance in question has classified 43 acres, or 1.14% of the total township

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> subsection (1) (b) of section 1004. In all such challenges, the board shall take evidence and made a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.
>
> Id., as amended, 1972, June 1, P.L. ___, No. 93, §910, effective in 60 days. (Footnotes omitted).

acreage, as a B district; in this B district apartments are permitted along with other essentially commerical uses, (4) and the record shows that the B district is already substantially developed.

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(4) The ordinance provides the following other uses in the B 1 zone:

2. Club, Fraternity house or lodge.

3. Educational, religious or philanthropic use, hospital, sanitarium or correctional institution.

4. Farm; greenhouse; municipal or recreational use; railway passenger station.

5. Store, personal service shop.

6. Office, bank, financial institution, telephone or telegraph business.

7. Place of amusement.

8. Hotel, restaurant, bakery, pastry, candy, confectionery or ice cream shop or factory.

9. Public garage; sales, service, and repair shop and gas filling and battery service station when authorized as a special exception by the Board of Adjustment in accordance with Sections 1100 to 1104 inclusive of this Ordinance.

10. Electrical shop; plumbing shop; paint store and paperhanger.

11. Tailoring, dressmaking, shoe repairing.

12. Jewelry, watches, clocks or optical goods.

Except for a three-block stretch of B district farther south in the township, most of the B district extends eight to ten blocks from the intersection of Sandy Bank Road and Providence Road north along Providence Road and ends at the intersection of Rose Tree Road and Providence Road. Appellant's tract is just north of this intersection. The width of this portion of the B district is 175 feet on either side of Providence Road (see Appendix).

Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental inter-

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13. Undertaking and embalming.

14. Private or minor garage.

15. Accessory use on the same lot with and customarily incidental to any of the above permitted uses.

16. Any use of the same general character as any of the uses hereinbefore specifically permitted when authorized as a special exception by the Board of Adjustment in accordance with Sections 1100 to 1104 of this Ordinance.

Zoning Ordinance of Upper Providence Township, Ordinance No. 34 of 1952, as amended, art. VII, §701.

ference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amend. V, XIV; Pa. Const. art. 1, §1; Girsh Appeal, 437 Pa. 237, 241 n.3, 263 A.2d 395 ___ n.3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, ___ (1965), citing, inter alia, Glorioso Appeal, 413 Pa. 194, 196 A.2d 668 (1964). Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare. See Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, supra.

In Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975), this Court reaffirmed its conviction that suburban communities which find themselves in the path of urban-suburban growth cannot establish residential enclaves by excluding population growth.(5) Willistown in fact was no departure from precedent but merely a culmination of prior case law which had invalidated zoning techniques which seriously impeded or effectively "zoned out" population growth. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra (invalidating a four acre lot minimum); Girsh Appeal, supra (invalidating a zoning ordinance which totally excluded apartments); Concord Twp. Appeal, supra (invalidating two and three acre lot minima).(6)

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(5) The Commonwealth Court decision in the instant case was handed down before our decision in Willistown.

(6) For a review of this Court's decisions in this area prior to Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970), see Comment, The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From Bilbar to Girsh - A Decade of Change, 16 Vill. L.Rev. 507 (1970).

In Willistown, this Court was confronted with a zoning ordinance amendment which permitted multi-family dwellings on 80 acres out of a total of 11,589 acres in the township. In striking down this land-use scheme as "tokenism" and thus exclusionary, we extended the prohibition in Girsh to include not only total exclusion of multi-family dwellings but also partial exclusion, or "selective admission." Twp. of Willistown v. Chesterdale Farms, Inc., 426 Pa. 455, 448-49, 341 A. 2d 466, 468 (1975). In so holding, we set forth the following rationale:

> "The implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. . . . "

Id., at 449, 341 A.2d at 468, quoting, Concord Twp. Appeal, 439 Pa. 466, 474, 268 A.2d 765, 768-69 (1970).

This Court's ruling in Willistown rested upon the premise of Girsh that where a municipal subdi-

vision "is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden." Appeal of Girsh, supra at 245, 263 A.2d at 399. It also embraces the more basic proposition that a political subdivision cannot isolate itself and ignore the housing needs of the areas surrounding it. To implement these concepts, we adopted the "fair share" principle, which requires local political units to plan for and provide land-use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries. Mr. Justice O'BRIEN, speaking for this Court in Willistown, stated:

> "The New Jersey Supreme Court, in Southern Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), in discussing a zoning ordinance which provided for a total exclusion of apartment dwellings, stated:
>
> 'We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for

low and moderate income housing and its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.' (Emphasis in original).

. . .

Nor are we convinced by Willistown's argument that Chesterdale's development plans would overburden its municipal services. Suburban municipalities within the area of urban outpour must meet the problems of population expansion into its borders by increasing municipal services, and not be the practice of exclusionary zoning."(7)

Id. at 449-450, 341 A.2d at ___.

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(7) Three members of the Commonwealth Court in Willistown reached the same conclusion:

"In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 469, 300 A.2d 107, ___ 1973)(opinion in support of affirmance), quoting Oakwood at Madison, Inc. v. Twp. of Madison, 117 N.J. Super. 11, 20, 283 A.2d 353, 358 (1971), cert. granted,

Some commentators have expressed concern that judicial adoption of the "fair share" test will thrust courts into the role of super boards of adjustment, thereby usurping a function that is more properly legislative or administrative in nature.(8) Such concern shows a misconception of what we contemplate our role will be. In establishing the "fair share" standard, this Court has merely stated the general precept which zoning hearing boards and government bodies must satisfy by the full utilization of their respective administrative

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62 N.J. 185, 299 A.2d 720 (1973)(emphasis added).

The Court of Appeals of New York has also embraced the view that a zoning ordinance should adequately provide for the housing needs of the particular community and reflect a balanced consideration for regional housing needs. Berenson v. Town of New Castle, 28 N.Y.2d 102, 111, 341 N.E.2d 236, ___, 378 N.Y.S.2d 672, 680-81 (1975). See also, Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971) (invalidating a prohibition on the use of mobile homes).

(8) See, e.g., Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L. J. 385, 492 (1977); Payne, The Delegation Doctrine in the Reform of Local Government Law, 29 Rutgers L.Rev. 803 (1976). The rejection of the "fair

and legislative expertise. We intend our scope of review to be limited to determining whether the zoning formulas fashioned by these entities reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs and development.

The case law of this jurisdiction, as

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share" test by Mr. Justice ROBERTS in his concurring opinion in the instant case appears to be somewhat belated. Mr. Justice ROBERT'S (sic) concurrence in our decision in Willistown cited with approval the opinion of Judge Mencer of the Commonwealth Court in that case. Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 454, 341 A.2d 466, 471 (1975) (ROBERTS, J., concurring opinion). It is clear from Judge Mencer's opinion in Willistown that he embraced the "fair share" concept. Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 569, 476, 300 A.2d 107, ___, ___ 1977) Opinion in support of affirmance); see note 7 supra. Furthermore, Mr. Justice ROBERT'S (sic) concern that our partial reliance upon New Jersey's Mount Laurel decision will press this Court into the land use planning business is exaggerated. We are not bound by New Jersey's purported "vast expansion of zoning principles." The "fair share" requirement, as we view it, is merely an analytical strand in the substantial relationship test already employed by this Court in reviewing zoning ordinances. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, ___(1965).

developed by this Court as well as the Commonwealth Court, both before and after our decision in Willistown is instructive as to the relevant factors to which a court must look in conducting a review of zoning ordinances which are alleged to be exclusionary. From this body of law a useful analytical method can by synthesized to aid our review. The initial inquiry must focus upon whether the community in question is a logical area for development and population grown. Girsh Appeal, supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra. The community's proximity to a large metropolis and the community's and region's projected population growth figures are factors which courts have considered in answering this inquiry. Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 143, 350 A.2d 895, ___ (1976).

Having determined that a particular community is in the path of urban-suburban growth, the present level of development within the particular

community must be examined.(9) Population density data and the percentage of total undeveloped land and the percentage available for the development of multi-family dwellings are factors highly relevant to this inquiry. Twp. of Willistown v. Chesterdale Farms, Inc., supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra; Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., supra; Decaro v. Washington Twp., 21 Pa. Commw. Ct. 252, 254, 344 A.2d 725, ___ (1975).

Assuming that a community is situated in the path of population expansion and is not already highly developed, this Court has, in the past, determined whether the challenged zoning scheme

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(9) Analytically, the present level of community development could be included under the initial inquiry as to whether a community was a local area for population growth and development. Commentators have noted, and probably correctly so, that a particular community might lie along a corridor of population expansion but already be so highly developed that it cannot properly be called a "developing" community. Ackerman, The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform, 1976, U. of Ill. L.R. 1, 13-15. For simplicity we consider the present level of community development as a separate analytical step.

effected an exclusionary result or, alternatively, whether there was evidence of a "primary purpose" or exclusionary intent to zone out the natural growth of population. Twp. of Willistown v. Chesterdale Farms, Inc., supra, citing, National Land and Investment Co., supra; Concord Twp. Appeal, supra. Because the Willistown "fair share" test compels judicial examination of the actual effect of a zoning ordinance upon the availability of multi-family dwellings, evidence of exclusionary motive or intent, whether direct or circumstantial, is not of critical importance.(10) Thus, Willistown marked an implicit departure away from judicial inquiry into the motives underlying a

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(10) In Willistown the only evidence of the township's exclusionary intent was the miniscule fraction (7/10 of 1%) of land available under that ordinance for the development of multi-family dwellings. See Twp. of Willistown v. Chesterdale Farms, Inc. 462 Pa. 445, 450, 341 A.2d 466, 467 (1975). Furthermore the opinion of Judge Mencer of the Commonwealth Court in Willistown emphasized that the exclusionary impact in Willistown was the inadvertent result of the township zoning ordinance . Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 464-65 & n.5, 300 A.2d 107, ___ ___ & n.5 (1973) (opinion in support of

articular zoning ordinance.(11) Our primary concern is centered upon an ordinance's exclusionary impact.

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affirmance.). It is possible to hypothesize a record replete with evidence of exclusionary intent but void of evidence of exclusionary impact. It would be difficult to conclude that our decision in Willistown forces invalidation of a zoning ordinance which has no exclusionary effect.

Different requirements pertain when it is alleged that a zoning ordinance perpetuates class-based or racially discriminatory housing patterns in violation of the Equal Protection Clause. In wuch a case, proof of this allegation would require evidence of racial or class-based motive. See Arlington Hts. v. Metro. Housing Deve. Co., ___ U.S. ___, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977). However, the instant case does not raise an equal protection challenge. Finally, it should be noted that the decisions of this Court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of certain uses, not on the exclusion of certain classes of people. Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (partial exclusion of multi-family dwellings); Concord Twp. Appeal, 439 Pa.a 466, 268 A.2d 765 (1970) (lot size restriction); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970) (total exclusion of apartments); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967) (exclusion of quarries); Ammon R. Smith Auto Co. Appeal, 423 Pa. 493, 223 A.2d 683 (1966) (ban on flashing signs); National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (lot size restrictions); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965) (ban on billboards).

In analyzing the effect of a zoning ordinance, the extend of the exclusion, if any, must be considered. Is there total exclusion of multi-family dwellings, which we disapproved in Girsh Appeal, supra, or is the exclusion partial? If the zoning exclusion is partial, obviously the question of the ordinance's validity is more difficult to answer. In resolving this issue, once again the percentage of community land available under the zoning ordinance for multi-family dwellings becomes relevant.

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(11) Recently the Commonwealth Court noted correctly that exclusionary intent is not an essential element in proving that an ordinance is unconstitutionally exclusionary:

> Finally it is urged that Waynesborough has not shown the "exclusionary intent" by the Township claimed to be a requisite for a holding of unconstitutionality. . . . Intent is not, however, an indispensable element, as in a criminal case. When other facts and circumstances indicate an unreasonable restriction on the use of land for multifamily dwellings, a conclusion that the ordinance is unconstitutional will stand without a finding of intent to exclude.

Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 143, 350 A.2d 895, 898 (1976).

This percentage must be considered in light of current population growth pressure, within the community as well as the region, and in light of the total amount of undeveloped land in the community. Where the amount of land zoned as being available for multi-family dwellings is disproportionately small in relation to these latter factors, the ordinance will be held to be exclusionary.(12)

It now remains to apply this analytical matrix to the facts of the instant case to ascertain if the ordinance in question reflects the proper consideration of the above-discussed factors. There can be little doubt that Upper Providence Township is a logical area for development and popula-

(12) We hasten to emphasize that the factors discussed thus far in no way comprises an exhaustive list. Nor is any one factor necessarily controlling. We anticipate that zoning boards and governing bodies, in the exercise of their special expertise in zoning matters, will develop and consider any number of factors relevant to the need for and distribution of local and regional housing. See Southern Burlington Co. NAACP v. Twp. of Mt. Laurel, 67 N. J. 151, ___ nn. 16-17, 336 A.2d 713, 747, nn. 16-17 (1975) (Pashman, J., concurring).

tion growth. This conclusion is supported by the fact that the township is located a mere twelve miles or so from Philadelphia and is situated at the intersection of two main traffic arties, one of which, Route 1, is a direct link with the city. See Girsh Appeal, supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra; Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., supra. The record shows that the township is not a high density population area; roughly one-quarter of the township land is undeveloped. Thus the township's present level of developement does not preclude further developement of multi-family dwellings. See note 9 supra.

The zoning ordinance in question results in a partial exclusion of multi-family dwellings, providing, as it does, 1.14% of the township land for development of multi-family dwellings. It is also significant that multi-family dwellings are only one of more than a dozen other uses permitted on this fraction of land. See note 4 supra. There-

fore, this land is not set aside for the exclusive use of multi-family dwellings; development of such dwellings must compete with the other uses permitted in the B district. The above analysis leads inescapably to the conclusion that the facts of the instant case are legally indistinguishable from those in Willistown.(13) Thus we hold that Upper Providence Township has not provided a "fair share" of its land for development of multi-family dwellings. Twp. of Willistown v. Chesterdale Farm, Inc., supra.

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(13) Appellees properly note that a presumption of validity attaches to any challenged zoning ordinance. Nevertheless, this presumption is rebuttable and was never intended to foreclose full judicial review of constitutional issues. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra at 522, 215 A.2d at ___. Where, as in the instant case, the facts show an obvious dearth of land zoned as available for multi-family dwellings, the proponents of the zoning ordinance must put forth adequate justification for this zoning-created scarcity. Appellee's concerns about population burdens, water supply, and the environment, while understandable, do not justify the fraction of land now open for development of multi-family housing. In National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra, this Court was faced with similar proffered justifications and

We therefore direct that zoning approval for appellant's land be granted and that a building permit be issued conditional upon appellant's compliance with the administrative requirements which are consistent with this opinion. Id.

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responded as follows:

> Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. . . .
>
> Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.

Id. at 527-28, 215 A.2d at ___(emphasis added)

Appellee-intervener's (sic) assertion that the greatest demand for housing in the township is for single-family homes on one acre lots rather proves too much. One need not probe too deeply into the econimic mechanics of supply and demand to realize that the zoned-in scarcity of land for multi-family dwellings could easily create this type of demand.

Former Chief Justice JONES did not participate in the consideration or decision of this case.

Mr. Justice MANDERINO concurred in the result.

Mr. Justice ROBERTS files a concurring opinion.

Supreme Court, U. S.
FILED
DEC 26 1978

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-799

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS,
Petitioners,

v.

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., and DELLA ENDERS, His Wife, JOHN F. ENDERS, JR., DELLA E. ENDERS and WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES,

Respondents.

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court.

PETITIONERS' SUPPLEMENTAL BRIEF.

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Supreme Court of the United States

October Term, 1978

No. 78-199

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.

Petitioners,

v.

HERBERT BARNES, et al.,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF.

Petitioners, Board of Supervisors of Buckingham Township, by their attorneys,[1] respectfully represent to the Court:

1. Enactment by General Assembly of Pennsylvania

Subsequent to the Pennsylvania Supreme Court's denial of Petitioner's Petition for Allowance of Appeal, and after time for the filing of a motion for rehearing had passed, but before this Petition for Certiorari was filed, the Governor of Pennsylvania signed into law Act 1978-249 (the "Act").[2] The Act amended the Pennsylvania Municipalities Planning Code,[3] inter alia, to provide that with respect to the filing of substantive challenges, such

1. Goncer M. Krestal, Lawrence J. Beaser, and Blank, Rome, Klaus & Comisky, attorneys for Petitioners were retained to represent Petitioners in this litigation subsequent to the filing of the Petition for Writ of Certiorari.

2. Senate Bill 1008, Printer's Number 2166. The new Act is set forth as a Supplemental Appendix beginning at p. A1.

3. Act of July 31, 1968, P. L. 805, as amended, 53 P. S. § 10101 et seq.

as those filed by Respondents [4] landowners must file a certification that

> ". . . the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or a proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use. . . ." Supplemental Appendix at A7.

The Act also prohibits a court from granting or enforcing relief with respect to a substantive challenge, such as was filed by Respondents in the instant case, "without first making an affirmative finding of fact that the landowner's certification . . . has in fact been made and is true and correct." Supplemental Appendix at A9.

Section 8 of the Act specifically applies the above quoted sections "to substantive challenges within the jurisdiction of any court on the effective date of this act."[5]

The instant litigation was clearly within the jurisdiction of a court on October 5, 1978, the effective date of the Act. Thus, by its terms, the statute applies to this case. Moreover, based upon the record below, Respondents would not be able to make the required certification, since Respondents knew of the Township's efforts to rezone, and of the particular new zoning proposal. See Petition for

4. See Petition for Writ of Certiorari at 9.

5. Section 8 states:

"Section 8. (a) Anything in this act to the contrary notwithstanding, the procedures established by section 1011 of this act shall apply to substantive challenges within the jurisdiction of any court on the effective date of this act.

(b) It is hereby declared that the provisions of subsection (a) are found to be needed to alleviate the problems caused by uncoordinated development of municipalities and are essential to the maintenance of the health, safety and welfare of the residents of the Commonwealth." Supplemental Appendix at A12.

Writ of Certiorari at 33. The Courts of Pennsylvania thus would be precluded from granting any relief to Respondents. In such an event, this Court would not have to resolve the serious Federal constitutional questions raised in the Petition for Writ of Certiorari.

Therefore, Petitioners respectfully pray that the Court grant the Petition for Writ of Certiorari, vacate the judgment below, and remand the case for consideration of the applicability of Pennsylvania Act 1978-249 thereto. *Thorpe v. Housing Authority of the City of Durham*, 386 U. S. 670, 87 S. Ct. 1244, 18 L. Ed. 2d 394 (1967) and 393 U. S. 277, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969). See also *Bradley v. School Board of City of Richmond*, 416 U. S. 714, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974).

2. Vested Rights of Respondents

Former counsel for Petitioners characterized the opinions of the Pennsylvania Commonwealth Court and the Court of Common Pleas of Bucks County as holding that Respondents had gained a "vested right" to develop their land in the manner set forth in their curative amendments. That statement was not authorized by Petitioners and is inaccurate.

Not only did the courts below not use the term "vested right" but the Pennsylvania Commonwealth Court, in quoting from *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 230, 328 A. 2d 464 (1974) (Appendix at 24), applied a balancing test to determine whether or not landowners, such as Respondents, are entitled to develop according to the curative amendment submitted. This explicit balancing test requires that Respondents proposals constitute "reasonable development plans." Indeed, this was recognized by the Court of Common Pleas of Bucks County which made development by Respondents "subject to reasonable restrictions to protect the public health, safety, welfare and morals." Appendix at 14-15.

Certainly, there is nothing in the opinions below which would impute a determination of the state courts that Re-

spondents had a "vested right" to develop their land forever protected from possible exercise by the Pennsylvania General Assembly of its police power, such as occurred with the enactment of Act 1978-249.

Any contrary characterization of the decisions below contained in the Petition for Writ of Certiorari was not intended or authorized by Petitioners.

Respectfully submitted,

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Attorneys for Petitioners.

SUPPLEMENTAL APPENDIX.

HOUSE AMENDED.
PRIOR PRINTER'S NOS. 1168, 1794, 1881, 2103.
PRINTER'S NO. 2166.

THE GENERAL ASSEMBLY OF PENNSYLVANIA.

SENATE BILL NO. 1008.

Session of 1977.

INTRODUCED BY HOWARD, LEWIS AND STAUFFER, JULY 6, 1977.

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES, SEPTEMBER 21, 1978.

AN ACT.

Amending the act of July 31, 1968 (P. L. 805, No. 247), entitled, as amended, "An act to empower cities of the second class A, and third class, boroughs, incorporated towns, townships of the first and second classes including those within a county of the second class and counties of the second class A through eighth classes, individually or jointly, to plan their development and to govern the same by zoning, subdivision and land development ordinances, planned residential development and other ordinances, by official maps, by the reservation of certain land for future public purpose and by the acquisition of such land; providing for the establishment of planning commissions, planning departments, planning committees and zoning hearing boards, authorizing them to charge fees, make inspections and hold public hearings; providing for appropriations, appeals to courts and penalties for violations; and repealing acts and parts of acts," further providing time

limitations regarding certain public hearing findings; further providing for zoning ordinances, further regulating the time of hearings, and further providing for substantive challenges.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 603 and clause (2) of section 605, act of July 31, 1968 (P. L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," are amended to read:

Section 603. Ordinance Provisions.—Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water;

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures;

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures;

(4) Density of population and intensity of use.

In addition, zoning ordinances may contain:

(1) Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) Provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency, pursuant to express standards and criteria set forth in the ordinances;

(3) Provisions for the administration and enforcement of such ordinances; [and]

(4) Such other provisions as may be necessary to implement the purposes of this act; *and*

(5) Provisions for the protection and preservation of natural resources and agricultural land and activities.

Section 605. Classifications.—In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

* * *

(2) For the regulation, restriction or prohibition of uses and structures at or near (i) major thoroughfares, their intersections and interchanges, and transportation arteries, (ii) natural or artificial bodies of water, (iii) places of relatively steep slope or grade, *or other areas of hazardous geological or topographic features,* (iv) public buildings and public grounds, (v) aircraft, helicopter, rocket, and spacecraft facilities, (vi) places having unique historical or patriotic interest or value, (vii) flood plain areas, ~~*agricultural areas, forests, wetlands, aquifers,*~~ and other places ~~*or natural features*~~ having a special character or use affecting and affected by their surroundings. As among several classes of zoning districts, the provisions for permitted uses may be mutually exclusive, in whole or in part.

Section 2. The act is amended by adding a section to read:

Section 609.2. Procedure Upon Municipal Curative Amendments.—(1) A municipality, ~~its governing body, or its planning agency,~~ by (formal action,) may declare its

zoning ordinance or portions thereof substantively invalid and propose to prepare a curative amendment to overcome such invalidity. Within thirty days following such declaration and proposal ~~by the governing body or planning agency~~, the governing body of the municipality shall:

(a) By resolution make specific findings setting forth the declared invalidity of the zoning ordinance which may include: (i) references to specific uses which are either not permitted or not permitted in sufficient quantity, (ii) reference to a class of use or uses which require revision, or (iii) reference to the entire ordinance which requires revisions.

(b) Begin to prepare and consider a curative amendment to the zoning ordinance to correct the declared invalidity.

(2) Within ~~two hundred seventy~~ ONE HUNDRED EIGHTY days from the date of the declaration and proposal, the municipality shall enact a curative amendment to, or reaffirm the validity of, its zoning ordinance pursuant to the provisions required by section 609, to cure the declared invalidity of the zoning ordinance.

(3) Upon the initiation of the procedures, as set forth in subsection (1), the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1 nor shall the Zoning Hearing Board be required to give a report requested under section 910 or 913.1 subsequent to the declaration and proposal based upon the grounds identical to or substantially similar to those specified in the resolution required by subsection (1)(a). Upon completion of the procedures as set forth in subsections (1) and (2), no rights to a cure pursuant to the provisions of sections 609.1 and 1004 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section.

(4) A municipality having utilized the procedures as set forth in subsections (1) and (2) may not again utilize said procedure for a thirty-six-month period following the date of the enactment of a curative amendment, or reffirmation of the validity of its zoning ordinance, pursuant to subsection (2); provided, however, if after the date of declaration and proposal there is a substantially new duty or obligation imposed upon the municipality by virtue of a change in statute or by virtue of a Pennsylvania Appellate Court decision, the municipality may utilize the provisions of this section to prepare a curative amendment to its ordinance to fulfill said duty or obligation.

Section 3. The introductory paragraph of subsection (a) of section 709 is amended to read:

Section 709. The Findings.—(a) The governing body, within [thirty] *sixty* days following the conclusion of the public hearing provided for in this article, shall, by official written communication, to the landowner, either:

* * *

Section 4. Subsection (9) of section 908, amended December 10, 1974 (P. L. 822, No. 272), is amended to read:

Section 908. Hearings.—The board shall conduct hearings and make decisions in accordance with the following requirements:

* * *

(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within forty-five days after the last hearing before the board or hearing officer. Except in home rule municipalities, where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance,

rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than forty-five days after the decision of the hearing officer. Where the board fails to render the decision within the period required by this subsection, or fails to hold the required hearing within [forty-five] *sixty* days from the date of the applicant's request for a hearing, the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the municipality shall give public notice of said decision within ten days in the same manner as provided in subsection (1) of this section. Nothing in this subsection shall prejudice the right of any party opposing the application to urge that such decision is erroneous.

• • •

Section 5. Clause (a) of subsection (2) of section 1004 of the act, added June 1, 1972 (P. L. 333, No. 93), is amended to read:

Section 1004. Validity of Ordinance; Substantive Questions; Landowner Appeals.—• • •

(2) The submissions referred to in subsection (1) shall be governed by the following:

(a) The landowner shall make a written request to the board or governing body that it hold a hearing on his challenge. The request shall contain a short statement reasonably informing the board or the governing body of the

matters that are in issue and the grounds for the challenge. *Such statement shall contain a certification that the landowner did not know at the time of the application (i) that the municipality had resolved to consider a particular scheme of rezoning by publication of notice of hearings on a proposed comprehensive plan or proposed zoning ordinance or otherwise, or (ii) that the scheme of rezoning would be inconsistent with the landowner's proposed use; provided that this rezoning scheme had reached sufficient particularity to disclose that, if adopted, it would cure the defect in the zoning ordinance attacked by the substantive challenge.*

• • •

Section 6. Subsections (1) and (2) of section 1011 of the act, added June 1, 1972 (P. L. 333, No. 93), are amended and a subsection is added to read:

Section 1011. Judicial Relief.—(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal, *only if it determines that:*

(a) the municipality has not acted in good faith or made a bona fide attempt in the adoption of its ordinances or maps, or any amendments thereto, to meet the statutory and constitutional requirements for nonexclusionary zoning; or

(b) the ordinance imposes limitations that are not reasonably related to the municipality's authority to determine its physical growth pattern, protect the Commonwealth's public natural resources, coordinate development with the provision of public services, or protect the character of the community. Where municipalities have adopted a joint municipal comprehensive plan and enacted zoning legislation consistent with the joint municipal comprehensive plan within a region pursuant to Articles XI and XI-A, the court, when determining the validity of a chal-

lenge to such a municipality's zoning ordinance shall consider the zoning ordinance or ordinances as they apply to the entire region and shall not limit its consideration to the application of the zoning ordinance within the boundaries of the respective municipalities.

(2) If the court, *in accordance with the standards provided in subsection (1),* finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order. *In issuing its order the court shall consider the following: (i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist; (ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities; (iii) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features; (iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and (v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.*

Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

* * *

(4) No court shall grant or enforce relief with respect to a substantive challenge without first making an affirmative finding of fact that the landowner's certification required by section 1004(2)(a) has in fact been made and is true and correct.

Section 7. The act is amended by adding an article to read:

ARTICLE XI-A

Joint Municipal Zoning

Section 1101-A. General Powers.—The governing body of each municipality cooperating in a joint municipal comprehensive plan, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal joint municipal zoning ordinances to implement the joint municipal comprehensive plan and to accomplish any of the purposes of this act. For these purposes, a municipality may enact ~~either:~~

~~*(1) a joint municipal zoning ordinance which has been or is to be enacted by each municipality cooperating in the joint municipal comprehensive plan; or*~~

~~(2)~~ ~~*its own zoning ordinance consistent with the joint municipal comprehensive plan.*~~ *AND OR ADOPT A JOINT MUNICIPAL ZONING ORDINANCE WHICH HAS BEEN OR IS TO BE ENACTED BY EACH MUNICIPALITY COOPERATING IN THE JOINT MUNICIPAL COMPREHENSIVE PLAN.*

Section 1102-A. Compliance With Code.—The governing body of each municipality cooperating in a joint municipal comprehensive plan and zoning ordinance shall otherwise comply with all applicable sections of the act.

Section 1103-A. Joint Municipal Comprehensive Plan. —(a) The governing body of a municipality, by formal action, may ~~declare its intention to adopt a~~ ADVERTISE A PROPOSED joint municipal comprehensive plan. The municipality shall have ~~one hundred eighty~~ SIXTY days from the date of ~~this declaration~~ THE ADVERTISEMENT to adopt such a plan.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the ~~declaration~~ ADVERTISEMENT required by subsection (a) and based upon the municipality's existing zoning ordinance.

Section 1104-A. Intention to Enact Zoning Ordinances.—(a) Subsequent to, or simultaneous with, the adoption of a joint municipal comprehensive plan, the governing body of a municipality cooperating in that plan, may declare its intention to enact a zoning ordinance pursuant to section 1101-A BY ADVERTISING THE SAME. The municipality shall have ~~one hundred eighty~~ ONE HUNDRED TWENTY days from the date of this ~~declaration~~ ADVERTISEMENT to enact such an ordinance.

(b) During this period of time, the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1, nor shall the zoning hearing board be required to give a report requested under section 910 or 913.1, subsequent to the ~~declaration~~ ADVERTISEMENT required by subsection (a) and based upon the municipality's existing zoning ordinance.

SECTION 1105-A. ADOPTION OF REGIONAL ZONING ORDINANCES.—(A) THE GOVERNING BODY OF EACH MUNICIPALITY PARTICIPATING IN THE JOINT MUNICIPAL COMPREHENSIVE PLAN SHALL ADOPT THE REGIONAL ZONING ORDINANCE IN ORDER FOR THE REGIONAL ORDINANCE TO BE EFFECTIVE.

(B) ONCE THE REGIONAL ORDINANCE IS EFFECTIVE THE MUNICIPAL ZONING ORDINANCE SHALL BE NULL AND VOID.

SECTION 1106-A. AMENDMENTS TO REGIONAL ZONING ORDINANCE.—(A) AMENDMENTS T ' THE REGIONAL ZONING ORDINANCE SHALL BE APPROVED BY A SIMPLE MAJORITY OF ALL PARTICIPATING MUNICIPALITIES INCLUDING THE MUNICIPALITY OR MUNICIPALITIES WHICH WILL BE PHYSICALLY AFFECTED BY THE PROPOSED AMENDMENT.

(B) THE SAME PROCEDURES SHALL BE FOLLOWED IN AMENDING THE REGIONAL ZONING ORDINANCE AS ARE SET FORTH IN ARTICLE VI.

SECTION 1107-A. REGIONAL HEARING BOARD. —(A) A REGIONAL HEARING BOARD IS HEREBY ESTABLISHED. IT SHALL POSSESS THE SAME POWERS AND DUTIES WITH RESPECT TO THE REGION AS THE ZONING HEARING BOARD PRESENTLY ENJOYS PURSUANT TO ARTICLE IX.

(B) EACH MUNICIPALITY SHALL APPOINT ONE PERSON TO SERVE ON THE REGIONAL HEARING BOARD.

SECTION 1108-A. INTENTION TO WITHDRAW. —A MUNICIPALITY MAY ANNOUNCE ITS INTENTION TO WITHDRAW FROM THE REGIONAL ZONING ORDINANCE, THE REGIONAL HEARING BOARD AND THE JOINT MUNICIPAL COMPREHENSIVE PLAN BY PASSING A RESOLUTION STATING THEREIN ITS INTENTION TO WITHDRAW. THE WITHDRAWAL SHALL NOT BECOME EFFECTIVE FOR A PERIOD OF THREE YEARS FROM THE DATE OF THE PASSING OF THE WITHDRAWAL RESOLUTION.

Section 8. (a) Anything in this act to the contrary notwithstanding, the procedures established by section 1011 of this act shall apply to substantive challenges within the jurisdiction of any court on the effective date of this act.

(b) It is hereby declared that the provisions of subsection (a) are found to be needed to alleviate the problems caused by uncoordinated development of municipalities and are essential to the maintenance of the health, safety and welfare of the residents of the Commonwealth.

Section 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 10. This act shall take effect immediately.

SUPREME COURT, U.S.
FILED
DEC 19 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.,

Petitioners,

v.

HERBERT BARNESS, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED

The provisions of 28 U.S.C. §2101(c) require that a petition for writ of certiorari be filed within ninety days after the entry of the judgment or decree sought to be reviewed. The docket of the Supreme Court of Pennsylvania made in connection with this case discloses that the Order of that Court denying a Petition for Allowance of Appeal filed by the Board of Supervisors of Buckingham Township was entered July 3, 1978 (Appendix to Petition for Writ of Certiorari, pages 33-36). The Petition for Writ of Certiorari in this case was filed with the Clerk of this Court on November 14, 1978, 126 days subsequent to the entry of the Order of the Supreme Court of Pennsylvania. Thus, the filing of the Petition for Writ of Certiorari was not timely.

Counsel for Petitioner apparently

takes the position that the ninety-day period permitted by statute for the filing of a petition for writ of certiorari did not begin to run until August 16, 1978, on which date the Prothonotary of the Supreme Court of Pennsylvania notified the parties to this litigation of the entry of the Order dated July 3, 1978. However, there is no precedent for the proposition that the date of notice to counsel of the entry of an order is the operative date for purposes of computation of the time within which a petition for writ of certiorari must be filed.

If counsel for Petitioner anticipated difficulty in filing a timely petition for writ of certiorari as a result of the delay in receiving notice of the entry of the Order of July 3, 1978, counsel could have availed himself of the provisions of Supreme Court Rule 22.4 permitting the filing of an application for extension of time within

which to file his Petition. No such application was filed.

For the preceding reasons, the Petition of the Board of Supervisors of Buckingham Township for Writ of Certiorari should be denied as untimely.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SPECIAL OR IMPORTANT REASON EXISTS FOR GRANTING SUCH WRIT

A. THE QUESTION OF STANDING

Petitioner contends that the respondents in this litigation, all of whom are landowners in Buckingham Township, did not have standing to challenge the Constitutionality of the Buckingham Township Zoning Ordinance. Petitioner cites Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197 (1975) as precedent for this contention. It is respectfully submitted that Petitioner's argument in this regard is without merit.

Petitioner suggests that in challenging the constitutionality of the Buckingham Township Zoning Ordinance the respondent property owners were seeking to assert the

rights of unnamed third persons. This is not the case. To the contrary, the challenges to the validity of the zoning ordinance were based upon the fact that the ordinance excluded from the entire township any new residential development other than the construction of single family dwelling houses. (See Opinion of the Commonwealth Court of Pennsylvania, Appendix to Petition for Writ of Ceriorari, page 19). For this reason, Warth v. Seldin, is inapposite.

Petitioner's argument concerning standing must further fail because standing to raise a substantive challenge to the constitutionality of the Buckingham Township Zoning Ordinance is conferred upon respondent landowners by Section 609.1 of the Pennsylvania Municipalities Planning Code, effective June 1, 1972, P.L. 333, No. 93, Section 10, 53 P.S. Section 10609.1 That statute provides, inter alia:

> A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004.

Each of the challenges to the validity of the Buckingham Township Zoning Ordinance was filed by a landowner. Thus standing was expressly conferred upon respondents by the statute set forth above.

B. THE CONSTITUTIONAL QUESTION

Petitioner contends that the Pennsylvania Courts in analyzing the challenges to the constitutionality of the Buckingham Township Zoning Ordinance have erroneously applied the Fifth and Fourteenth Amendments to the United States Constitution in concluding that the zoning ordinance in question was unconstitutional because it did not provide for townhouses, apartments, and mobile homes. Petitioner argues that when a challenge to the constitutionality of a

zoning ordinance is made the issue is whether the property of the challenger has been taken without just compensation. This argument evidences a fundamental misunderstanding of the issue decided by the Pennsylvania courts in this litigation as well as a misunderstanding of previous decisions of this Court.

In Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1928), this Court clearly articulated the standard of review to be applied where a zoning ordinance was alleged to be unconstitutional. This Court stated:

> The governmental power to interfere by zoning regulations with the general right of the land owner by restricting the character of his use, is not unlimimted, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.
> 277 U.S. 183, 188.

In analyzing constitutional challenges to zoning ordinances the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court have in each case analyzed the

zoning ordinance in question to determine whether the ordinance bears a substantial relationship to the health, safety, morals or general welfare of the community. The Pennsylvania courts have further recognized that each zoning case involves a different set of facts and circumstances in light of which the constitutionality of the zoning ordinance must be tested. National Land and Investment Co. v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965); Exton Quarries Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); Girsh Appeal 437 Pa. 237, 263 A.2d (1970); Surrick v. Zoning Board for the Township of Upper Providence, 476 Pa. 182, 382 A.2d 105 (1977); East Pikeland Township v. Bush Brothers, Inc., 13 Pa. Commonwealth Ct. 578, 319 A.2d 7 (1974); CampHill Development Co., Inc, v. Zoning Board of Dauphin, 13 Pa. Commonwealth Ct. 519, 319 A.2d 197 (1974).

The opinion of the Commonwealth Court in this case affirming the decision of

Court of Common Pleas of Bucks County holding to the Buckingham Township Zoning Ordinance to be unconstitutional indicates that that Court properly determined that the zoning ordinance in question is unconstitutional because no provision is made for apartments, townhouses, or mobile homes, all of which Pennsylvania courts have found to be legitimate residential uses, and because this exclusion bears no substantial relationship to health, safety, morals or the general welfare of the community. (See Opinion of Commonwealth Court, Appendix to Petition for Writ of Certiorari, page 19 et. seq.). The finding is supported by the record and there is no compelling reason why this Court should review that conclusion.

C. THE QUESTION OF JUDICIAL RELIEF

Buckingham Township urges this Court to grant its Petition for Writ of Certiorari because it is dissatisfied with the relief afforded to the successful challengers to the Buckingham Township Zoning Ordinance by the Pennsylvania Court. However, the question

of the relief to be granted to the challengers is purely a matter of state law and should not be reviewed by this Court.

Section 1011(2) of the Pennsylvania Municipalities Planning Code, Act of June 1, 1972, P.L. 333, No. 93, Section 19, 53 P.S. Section 11011(2), provides inter alia:

> (2) If the court finds that . . . a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials . . . it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body . . . for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

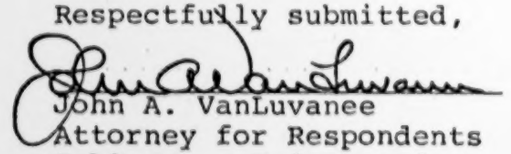
The Opinion and Order of the Court of Common Pleas of Bucks County, affirmed by the Pennsylvania Commonwealth Court, was within the guidelines of the statutes set forth above. The Commonwealth Court in its Opinion found that under the circumstances of this case the granting of relief to the successful challengers was necessary and appropriate. (See Opinion of Commonwealth Court, Appendix to

Petition for Writ of Certiorari, page 19 et. seq.). The determination by Pennslyvania Courts of the appropriate judicial relief authorized pursuant to Pennsylvania statute does not raise a federal question which may be reviewed by this Court.

CONCLUSION

Respondents, Claude J. Schlanger; John F. Enders, Jr., and Della E. Enders, his wife; and John F. Enders, Jr., Della E. Enders, his wife and William J. Shedden, Jr. respectfully request this Court to deny the Petition for Writ of Certiorari filed by the Board of Supervisors of Buckingham Township.

Respectfully submitted,



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